

Confederated Tribes of the Umatilla Indian Reservation

Department of Natural Resources

Administration

P.O. Box 638

Pendleton OR 97801

Phone 541-276-3447 Fax 541-276-3317

August 7, 2003

Mr. Michael K. Powell, Chair
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Submitted via Electronic Filing.

RE: **Docket Number 03-125**, COMMENTS REGARDING PROPOSED
PROGRAMMATIC AGREEMENT BETWEEN THE FEDERAL
COMMUNICATIONS COMMISSION AND THE ADVISORY COUNCIL ON
HISTORIC PRESERVATION.

Dear Chairman Powell and Commissioners:

The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Department of Natural Resources (DNR) has the following technical comments on the proposed Programmatic Agreement (PA) between the Federal Communications Commission (FCC) and the Advisory Council on Historic Preservation (ACHP). Overall the PA is a good start at defining the consultation process, however several issues need to be resolved. First, the FCC has the obligation to consult with the CTUIR. Second, communication is the most fundamental element of consultation, and both the FCC and the applicant need to communicate early and often with tribes on activities proposed which may affect historic properties.

The FCC can not delegate to the applicant the obligation to consult without the consent of the consulting tribe(s) as is the apparent goal of Alternative A, Section IV. Alternative A acknowledges the FCC'S obligation to consult, but then attempts to authorize applicants to initiate and conclude consultation with tribes on undertakings. The CTUIR DNR supports the United South and Eastern Tribes (USET) proposal for Alternative B of Section IV for consultation. Alternative B acknowledges that one of the strongest justifications for the obligation of the FCC itself to consult is that, over time, the agency will develop an expertise in knowing who to consult and when. The license applicant will lack this expertise. Additionally, the tribe(s) can address issues of concern directly with the FCC, not through the applicant. Alternative B also makes clear that only the tribe knows what areas may be Traditional Cultural Properties and what resources may be impacted by a license. Alternative B should be included in the final draft of the PA.

The CTUIR DNR also agrees with the Navajo Nation comments regarding notification in Section III.B and referenced in Section III.A. With the degree of technical detail in the agreement, it is impossible to tell whether the activity proposed to be exempted from the Section 106 process could have an effect on a historic property. This agreement was apparently written by lawyers for lawyers and is largely opaque to a non-lawyer cultural resource manager whose primary concern is avoiding construction of a cell tower in the middle of a burial site. I can only imagine that this agreement is equally unintelligible to someone pursuing a permit who will have to read and implement this PA and who may have little or no idea what a Historic Property is much less whether their tower is an Undertaking for the purposes of this PA or the NHPA. Therefore, tribal notification is the only way to insure that tribal sites and resources are not inadvertently impacted. Without this notification, vulnerable resources are at risk. To this end, we strongly support the inclusion of the bracketed language in Section III.B. in the final PA.

We understand that the desire to streamline the Section 106 process is strong for regulatory agencies such as the FCC who do not manage lands. However, if this document is intended to provide blanket exemptions for certain activities involving ground disturbance and construction, we must err on the side of caution and insure that the resources are protected. While, in the past, we have had effective communications with various communications firms on towers, such experience has been inconsistent within and between the vast number of telecommunication companies. I will repeat, the only way for the FCC and a tribe to be sure that the applicant is fully aware of historic properties, traditional cultural properties and other tribal resources is for the FCC to consult directly with the tribe and the applicant.

Some of the statements made in this document are misleading. For instance, Section VI.C.3. states:

No archaeological survey shall be required if the Undertaking is unlikely to cause direct effects to archaeological sites.

This statement contains a circular-logic which defeats the intent of the PA. First of all, one can not know whether there are archaeological sites in an area without doing an archaeological survey. Further, the NHPA requires evaluation of both direct and indirect effects on archaeological sites therefore the limitation to “direct effects” is inconsistent with the law. It is obvious that if one does nothing more than a literature search to find sites in an area which has never been surveyed, **they are not going to find anything**. It is only reasonable to expect that you try to identify the resources before concluding that they will not be affected. The above referenced sentence should be removed.

The CTUIR DNR echoes the concerns of USET that the collocation PA was not the subject of consultation with the tribes. While the notice was published in the Federal Register, we can not document any communication with the CTUIR DNR regarding this agreement. I would request further discussions between FCC staff and the tribes regarding formal consultation on revisions to the collocation PA.

The CTUIR DNR appreciates the opportunity to comment on the proposed PA and invites the FCC to meet to discuss further drafts of this PA in order to formally initiate consultation. If you have any further questions or concerns, please feel free to contact me at 541-966-2334.

/s/

Audie Huber

Intergovernmental Affairs Manager

Cc: Cultural Resources Committee
Jeff VanPelt, Program Manager, Cultural Resources Protection Program
Advisory Council on Historic Preservation, Chair, Chairman John L. Nau, III
Jeffrey Steinburg, Dep. Chief, Commercial Wireless Division